

RECEIVED

MAY 9 1979

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October 1979 Term

NO. _____

78-6659

JOHNNY L. BLAKE, Petitioner

vs.

VINSON F. THOMPSON, Warden,
~~and~~ TENNESSEE STATE PENITENTIARY, Respondent

RICHARD W. WEINTHAL
Attorney for Petitioner
Suite 934 - 100 N. Main
Memphis, Tennessee 38103
Telephone: (901) 526-6688

IN THE SUPREME COURT OF THE UNITED STATES

October Term - 1979

NO.

78-6659

JOHNNY L. BLAKE, Petitioner

vs.

VINSON F. THOMPSON, Warden,
and TENNESSEE STATE PENITENTIARY, Respondent

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

PETITIONER, PRESENTLY INCARCERATED in a penitentiary in the State of Tennessee under the jurisdiction of the Respondent, asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis. The Petitioner's Affidavit in support of this Petition is attached hereto.

COUNSEL FOR PETITIONER

Richard W. Weinthal
RICHARD W. WEINTHAL

RECEIVED

MAY 9 1979

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term - 1979

NO.

78-6659

JOHNNY L. BLAKE, Petitioner

vs.

VINSON F. THOMPSON, Warden,
and TENNESSEE STATE PENITENTIARY, Respondent

AFFIDAVIT IN SUPPORT OF MOTION

I, Johnny L. Blake, being duly sworn, depose and say:

I am presently confined in a Tennessee State Penitentiary, pursuant to a sentence imposed upon my conviction in the Criminal Court of Shelby County, Tennessee, for murder in the first degree. The denial of my Petition for Habeas Corpus by the United States District Court for the Western District of Tennessee, Western Division, was affirmed by the United States Court of Appeals for the Sixth Circuit. I now wish to obtain a review of that affirmance by filing a Petition for Certiorari in this Court; because of my poverty, I am unable to pay the fees and costs of this proceeding or give security therefor. I believe I am entitled to redress and am making this Affidavit in good faith.

Johnny L. Blake
JOHNNY L. BLAKE

STATE OF TENNESSEE

COUNTY OF *Madison*
TIDSON

SWORN TO AND SUBSCRIBED before me this 1 day of

May, 1979.

Ray H. Hensley
Notary Public

MY COMMISSION EXPIRES:

6 Sept 1980

RECEIVED

MAY 9 1979

OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED

MAY 9 1979

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October 1979 Term

NO. _____

78-6659

JOHNNY L. BLAKE, Petitioner

vs.

VINSON F. THOMPSON, Warden,
~~and~~ TENNESSEE STATE PENITENTIARY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD W. WEINTHAL
Attorney for Petitioner
Suite 934, 100 N. Main Bldg.
Memphis, TN 38103
Telephone: (901) 526-8107

INDEX

PAGE

I.	Opinion Below-----	1
II.	Jurisdiction-----	1
III.	Questions Presented for Review-----	2
IV.	Constitutional and Statutory Provisions-----	2-5
V.	Statement of the Case-----	5-8
VI.	Argument for Granting Certiorari-----	9-13
VII.	Conclusion-----	14
Appendix		
A.	Opinion of the United States District Court-----	15-19
B.	Order of the United States Court of Appeals for the Sixth Circuit-----	20

RECEIVED
MAY 9 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October 1979 Term

NO.

78-6659

JOHNNY L. BLAKE, Petitioner

vs.

VINSON F. THOMPSON, Warden,
and TENNESSEE STATE PENITENTIARY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to re-
view the decision of the United States Court of Appeals for the
Sixth Circuit decided and filed February 9, 1979.

I.

OPINION BELOW

The opinion of the Court of Appeals below is attached
as an Appendix hereto.

II.

JURISDICTION

The Order of the Court of Appeals was entered on Febru-
ary 9, 1979. Jurisdiction of this Court is invoked under 28
U.S.C. §1254(1), and Rule 19 of the Rules of this Court.

III.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in the event that a state criminal defendant
has been fully heard in the state trial court with respect to
issues involving his federal rights, and has appealed the ad-
verse decision of the trial court on the federal question to the
state court of appeal, but has failed to assign the adverse de-
cision of the state court of appeal on the federal question as
error in his petition to the state supreme court for certiorari,
such state criminal defendant has waived his federal claim for
purposes of federal habeas corpus, so that his federal habeas
petition must be denied even though there is no available state
remedy remaining.

2. Whether the federal constitutional requirement that
state criminal defendants must be proved guilty beyond a reason-
able doubt as a prerequisite to conviction requires that a due
process claim of insufficient evidence in the state trial should
be upheld, in federal habeas corpus, if the district court finds
that the evidence cannot reasonably be said to support the ver-
dict; or whether the present test, under which the petition may
be granted only if the verdict is "totally devoid of evidentiary
support," should be upheld.

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

AMENDMENT 5.

Criminal actions-Provisions concerning-Due process of law
and just compensation clauses.-No person shall be held to answer
for a capital, or otherwise infamous crime, unless on a present-
ment or indictment by a grand jury, except in cases arising in
the land or naval forces, or in the militia, when in actual ser-
vice in time of war or public danger; nor shall any person be

subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6.

Rights of the accused.-In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 14.

Citizenship-Due process of law-Equal protection.-All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of

habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7); inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the

provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

V.

STATEMENT OF THE CASE

Johnny L. Blake is incarcerated in the Tennessee State Penitentiary pursuant to a judgment of the Criminal Court of Shelby County, Tennessee, Division II, Honorable Arthur C. Faquin, Jr., presiding, entered on March 21, 1974, sentencing Johnny L. Blake to incarceration in the State Penitentiary for a period of ninety-nine (99) years. That judgment was entered as a result of Mr. Blake's trial and conviction of first degree murder, after his plea of not guilty to an indictment returned by the Shelby County Grand Jury on July 3, 1973.

This was Johnny L. Blake's second trial; his first trial had resulted in a hung jury. Among the Assignments of Error in Mr. Blake's Motion for New Trial before Judge Faquin was an assignment alleging insufficiency of the evidence. On denial of his Motion for New Trial, Mr. Blake made the same contention as one of his Assignments of Error to the Tennessee Court of Appeals. The judgment was affirmed on appeal, and Mr. Blake then petitioned the Tennessee Supreme Court for certiorari. Inexplicably, the question of sufficiency of the evidence did not appear among the Assignments of Error in the Petition for Certiorari. Certiorari was denied by the Tennessee Supreme Court without comment on the question of sufficiency of the evidence.

On December 19, 1977, Mr. Blake petitioned the United States District Court for the Western District of Tennessee, Western Division, Judge Harry W. Wellford presiding, for habeas corpus, on the grounds that the evidence adduced at the State

trial was so slight that his continued incarceration pursuant to his conviction at that trial constitutes a denial of due process. (Appendix to Petitioner's Brief before the Sixth Circuit Court of Appeal, hereinafter referred to as "A") (A 3-8). Such ground for habeas corpus relief is specifically sanctioned by the portions of 28 U.S.C. §2254 set out in Part IV, hereinabove.

A Motion to Dismiss was filed on behalf of the State of Tennessee, which relied upon Wainwright v. Sykes, 97 S. Ct. 2497(1977), for the proposition that Mr. Blake failed to exhaust his state remedies. It was further contended, in the State's Motion, that the transcript of the state trial proceeding alone is sufficient to establish, as a matter of law, that Mr. Blake's conviction was not "totally devoid of evidentiary support." Therefore, the State argued, the Petition should be dismissed for failure to present a federal question.

Although the State expressly couched its procedural ground for dismissal of the Petition in terms of the exhaustion requirement of 28 U.S.C. §2254, it was admitted in the State's Memorandum that Mr. Blake had no remedy at State law at the time that the Petition was filed, and it is evident in light of the State's reliance upon Wainright, supra, that the true contention of the State was not that Mr. Blake had failed to exhaust his State remedies, but rather, that in the course of his State Appeal he had waived his right to assert the insufficiency of the evidence against him and therefore, in keeping with Wainright, the United States District Court must hold him to that waiver and refuse to hear the claim. (A 12-13) In this connection the State admitted that under the waiver test articulated in Fay v. Noia, 372 US 391, 83 S. Ct. 822 (1963), no waiver would be found, not only because there was no evidence that Mr. Blake "knowingly

and intelligently chose not to ask the Supreme Court of Tennessee to consider his attack on the sufficiency of the evidence," but also, because the State would be "unable to offer any purported reasons why Mr. Blake may have abandoned this ground in the Supreme Court of Tennessee, either for tactical reasons or for any other purpose." (A 14-15) Nevertheless, the State argued, waiver must be found in light of the more recent decision in Wainwright, supra, "Whereby federal habeas review would be barred absent a showing by applicant of 'cause' for his State procedural default and a further showing of prejudice thereby." (A 15)

Mr. Blake's Memorandum in reply argued that the import of the Wainwright opinion and concurring opinions was that the new test would replace the Fay test only as to trial and pre-trial state procedural defaults, so that wherever, as in the instant case, the State's defense to the Petition is based upon a failure to conform to the rules of State post-trial procedure, the old Fay test would govern. Further, it was contended on behalf of Mr. Blake that although his conviction may not have been totally devoid of evidentiary support, still, the evidence adduced against him was so scant and self-contradictory as to raise a due process issue nevertheless. (A 35-45)

On May 22, 1978, Judge Wellford filed a Memorandum Opinion, wherein he held that the cause-prejudice test of Wainwright would be applied to the instant case, and further, that Mr. Blake's Petition would be denied unless he could demonstrate that "there was no relevant evidence whatever to support the jury's finding of guilt." Mr. Blake was given thirty (30) days to show first, that he was entitled to be heard under the new Wainwright test, and second, that his conviction was supported by "no relevant evidence whatever." (A 46-50)

Mr. Blake was unable to respond to these requirements, and therefore, on July 13, 1978, Judge Wellford dismissed the

cause. (A 51) Mr. Blake entered his notice of appeal, and Judge Wellford certified that there was probable cause for the Appeal. (A 52-54)

On February 9, 1979, by its Order appended hereto, the Sixth Circuit Court of Appeals affirmed Judge Wellford's dismissal of Mr. Blake's Petition for Habeas Corpus.

ARGUMENT FOR GRANTING CERTIORARI

The First Question Presented in this case warrants the granting of this Petition under Rule 19(b) of the Rules of this Court. In Wainwright v. Sykes, supra, this Court expressly declined to decide the question. Thus, Justice Rhenquist, in a footnote, remarked as follows:

"We have no occasion today to consider the Fay rule as applied to the facts there confronting the Court. Whether the Francis rule should preclude a federal habeas review of claims not made in accordance with state procedure where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of these claims of trial error considered by a state appellate court, we leave for another day."

97 S. Ct., at 2507. Emphasis added.

After the decision came down in Wainwright, supra, there was no consensus among those circuits which confronted the issue as to how it should be resolved. In some cases the new rule, requiring the habeas petitioner to show "cause" and "prejudice" as to a default under state procedures resulting in the denial of his federal claim, was extended to post-trial waiver determinations. In other decisions, the new rule was limited to the trial and pre-trial contexts in state prosecutions, where the policy considerations which engendered it are most compelling, and the "deliberate bypass" test of Fay v. Noia, supra, was afforded continuing vitality as to questions of waiver of federal claims within the appellate phase of state criminal prosecutions. Finally, two circuits appear to have adopted an intermediate position, applying the new rule or the old rule in the state appellate context, depending upon whether the defendant did or did not have competent counsel in the appellate phase of his state criminal case when his federal claim was allegedly waived.

As shown by the Appendix hereto, the Sixth Circuit has circumvented the question in the Petitioner's case. Petitioner has already noted, at page 7 of this Petition, that in this case the District Court has held that the test used in Wainwright v. Sykes, supra, has blanket application to procedural defaults in the presentation of federal claims during the appellate phase of state criminal prosecutions, relying on the Fifth Circuit's decision in Evans v. Maggio (5th Cir. 1977), 557 F2d 430.

It now appears, however, that Evans, supra, is no longer the law in the Fifth Circuit. In Spinkellink v. Wainwright (5th Cir. 1978), 578 F2d 582, the Court held as follows:

"Whether Spinkellink's procedural default actually falls within the ambit of Wainwright v. Sykes, supra, and, concomitantly, whether sufficient prejudice exists in this case so as not to bar federal habeas corpus review, are difficult questions on which we need not pass. Spinkellink's contentions regarding the exclusion of the two veniremen must fail on their merits as a matter of law for reasons to be discussed; petitioner thus is not entitled to relief on the basis of these contentions even if Wainwright v. Sykes does not prevent him from raising them. . . ."

578 F2d 582, at 592 (Emphasis added).

More recently, the Fay v. Noia "deliberate by-pass" test was expressly applied in the Fifth Circuit to the state appellate context, without discussion. Tifford v. Wainwright (5th Cir. 1979), 588 F2d 954, at 956. The Fourth Circuit has also decided that the test articulated in Fay v. Noia, supra, should continue to apply to alleged waivers of federal claims during state criminal appeals. In Ferguson v. Boyd (4th Cir. 1977), 566 F2d 873, the Fourth Circuit said:

"Without undertaking to consider the full scope of Sykes at this time, we hold it inapplicable to bar this petitioner, who did raise the issue dealt with herein at trial but then proceeded by state habeas instead of appeal, especially inasmuch as the record does not indicate a deliberate bypass of the appellate route for tactical reasons. Fay v. Noia. . ."

566 F. 2d 873, at 879.

Meanwhile, two circuits appear to have adopted the above-described intermediate position. See Ennis v. LeFevre (2d Cir. 1977), 566 F2d 1072, and Boyer v. Patton (3rd Cir. 1978), 579 F2d 284.

Should the Petition for Certiorari be granted, Petitioner will argue strenuously for the continued application for the "de-liberate bypass" test to alleged waivers of federal claims during state criminal appeals.

The Second Question Presented is governed, under the present state of the law, by the decision of this Court in Thompson v. City of Louisville (1960), 80 S. Ct. 624, 362 U.S. 199, where-in Justice Black, writing for the Court, had said that a due process violation occurred where there was no semblance of evidence from which any person could reasonably infer that the defendant committed the offense of which he was convicted. (362 U.S., at 205) In subsequent cases, the lower federal courts, concerned lest a precedent be established that would require every state court jury verdict to be second-guessed in a federal court, adopted a "no evidence" standard for reviewability of due process claims founded upon insufficiency of the evidence, so that the Thompson case was very nearly limited to its facts.

Two recent milestone decisions of the United States Supreme Court suggest strongly that the "no evidence" or "totally devoid of evidentiary support" test, adopted by the Court below, must give way to a more liberal standard of reviewability. The first is In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) where this Court held unequivocally for the first time that procedural due process encompassed a right not to suffer conviction of a crime, state or federal, absent proof of guilt beyond a reasonable doubt. Said the Court:

"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence--that bedrock 'axiomatic and elementary' principal whose 'enforcement lies at the foundation of the administration of our criminal law'...as the dissenters in the New York Court of Appeals observed [in this case], and we agree, 'a person accused of crime...would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.'

"The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for a commission of a crime when there is reasonable doubt about his guilt."

Significantly, Justice Black, who wrote the opinion in Thompson v. City of Louisville, dissented in In re Winship.

The second development pointing to a relaxation of the strict standard applied to due process claims based on the insufficiency of the evidence after the decision in Thompson, supra, was the holding of the U. S. Supreme Court in Stone v. Powell, 428 U.S. 465 (1976), that Fourth Amendment claims, the traditional remedy for which is of course the exclusion of otherwise competent evidence against a defendant, would not be cognizable in federal habeas corpus whenever there had been an opportunity for their full and fair litigation in state court. The prime rationale for this retreat from the grand aspirations of Fay v. Noia, supra, to a mechanical application of the res judicata concept to bar a broad class of potential federal habeas claims appears in footnote 31 of the opinion:

"Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusion on the values important to our system of government." (Emphasis added.)

In Stone, it therefore appears that federal habeas corpus intervention, heretofore conceived as a necessary tool for the protection of all federal rights of the accused in state criminal proceedings, will now be regarded as serving the narrower purpose of protecting such of those rights as bear a relationship to the accuracy of guilt/innocence determinations.

Recently Justice Stewart, dissenting from the denial of certiorari in Freeman v. Zahradnick, 97 S. Ct. 1150 (1977), articulated the relationship between these two cases as follows:

"If, after reviewing the evidence in the light most favorable to the state, a federal court determines that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt of the state offense with which he was charged, it is surely arguable that the Court must hold, under Winship, that the convicted defendant was denied due process of law."

"The approach I suggest would expand the contours of one kind of claim cognizable on federal habeas corpus. But if such an approach is constitutionally required, a federal habeas court asked to determine whether the evidence in a state prosecution was sufficient would be discharging the principal function underlying its jurisdiction--determining whether a defendant's custody is in violation of federal constitutional law. And the question whether a defendant has been convicted without sufficient evidence is hardly irrelevant to innocence. Cf Stone v. Powell [428] U.S.(465). . . . Indeed, an affirmative answer to this question means not merely that a defendant might have been, but that he was in fact improperly convicted."

(Emphasis in original. 97 S. Ct. 1150, at 1151-1153.)*

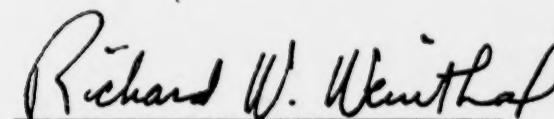
The petitioner submits that Justice Stewart's argument has compelling force. Surely, now that it is established that due process make proof beyond a reasonable doubt a prerequisite for a criminal conviction, a federal habeas court can no longer ignore a claim that, on the face of the state trial record, no reasonable jury could have found sufficient evidence to support a belief beyond a reasonable doubt in the defendant's guilt. The mere fact that there may be some evidence tending to indicate guilt can no longer be sufficient, after Winship, supra.

*For a more complete discussion of these concepts see Dialectical Federalism: Habeas Corpus and the Court, Robert M. Cover and T. Alexander Aleinikoff, 86 Yale Law Journal 1035 to 1102.

VII.

CONCLUSION

Petitioner respectfully submits, therefore, that this case is an appropriate one for the grant of the Writ of Certiorari.



RICHARD W. WEINTHAL
Attorney for Petitioner
Suite 934, 100 N. Main Building
Memphis, TN 38103
Telephone: (901) 526-8107

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION



JOHNNY L. BLAKE,
Petitioner,
v.
VINSON THOMPSON,
Respondent.

NO. 77-2772



MEMORANDUM OPINION

This is a habeas corpus action, pursuant to 28 USC § 2254, whereby plaintiff alleges the legality of his confinement in the Tennessee State Penitentiary. He is currently serving a ninety-nine year sentence for his first degree murder conviction in the Criminal Court of Shelby County, Tennessee.

In this petition,^{1/} petitioner challenges the sufficiency of the evidence to sustain his conviction, apparently alleging a violation of his Fourteenth Amendment due process rights. Respondent, in response, asserts two bases for denying petitioner's prayer for relief: First, petitioner's failure to pursue this claim in his petition for certiorari to the Supreme Court of Tennessee, see Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977); second, under the applicable scope of federal habeas review of challenges to the sufficiency of the evidence, petitioner was not deprived of due process.

^{1/} Petitioner has previously filed a habeas action in this Court, Blake v. Morford, No. C-75-486, which was dismissed after the respondent's response. In that action, petitioner alleged that he was tried for an offense not charged in the indictment, in violation of his due process rights, which claim petitioner renews in this action. Because the Court addressed the merits of that issue previously, that claim is not properly before the Court at this time.

The Court has considered the full briefs submitted by counsel for both parties on the interesting questions presented.

I. PROCEDURAL DEFAULT:

Petitioner pursued his challenge to the sufficiency of the evidence in his motion for a new trial addressed to the state trial court, and on direct appeal to the Tennessee Court of Criminal Appeals, which expressly denied petitioner's relief on this ground. That claim was not, however, assigned as error in his petition for certiorari in the Tennessee Supreme Court, which was denied. Under well-established Tennessee law, a challenge to the sufficiency of the evidence is not a claim cognizable in state habeas corpus or post-conviction relief actions. Gant v. State, 507 S.W.2d 133 (Tenn.Crim.App. 1973), cert. den., Id. (1974). Is the exhaustion of remedies doctrine inapplicable because there is no state remedy "available" to petitioner under 28 USC § 2254(b)? See Preiser v. Rodriguez, 411 U.S. 475 (1973).

Respondent maintains the petitioner's failure to pursue his remedy in the Tennessee Supreme Court amounts to a procedural default barring federal habeas review under Wainwright v. Sykes, supra. See Fay v. Noia, 372 U.S. 391 (1963). If the procedural default involved here occurred at trial, there would be little doubt that the Sykes standard, which precludes federal habeas review absent a showing of "cause" and "prejudice" attendant to a state procedural waiver, should apply. The decision in Sykes emphasized making state trial the "main event", so that all issues bearing on the charge will be aired in one proceeding. (53 L.Ed.2d 610). Should the Sykes standard, which replaced

the "knowing and intelligent waiver" rule of Fay v. Noia, supra, apply to these facts? Compare Fay where, as here, the criminal defendant who was represented by counsel chose not to pursue an appellate remedy as noted in 53 L.Ed. at 608-09, n.12. Chief Justice Burger, concurring in Sykes, felt that the Fay rule was never meant to encompass trial errors, and implied that it is only proper where "important rights [hang] in the balance of defendant's own decision..." The procedural decision not to present the standard of evidence was apparently made by petitioner's counsel in the petition for certiorari to the Tennessee Supreme Court. See Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977), and Francis v. Henderson, 425 U.S. 536 (1976).

In Evans, the defendants had properly challenged the jury composition at trial, but abandoned this issue on appeal. The Evans court cited Sykes in support of its holding denying habeas corpus relief. Petitioner should be required in this situation to demonstrate "cause" and "prejudice" in light of these appellate decision.

Under the Fay standard, if applied, petitioner himself may not be said to have "deliberately by-passed" his state remedy, but here instead the burden rests upon the petitioner to demonstrate a showing of "cause" and "prejudice" attendant to a demonstrated state procedural error in failing to raise the evidence question before the highest Tennessee court. Frazier v. Czarnetsky, 439 F.Supp. 735 (S.D. N.Y. 1977).

The Court will afford petitioner thirty (30) days in which to demonstrate the requisite "cause" and "prejudice" under the decisions cited.

II. SUFFICIENCY OF THE EVIDENCE:

The Sixth Circuit Court of Appeals has recently delineated the proper scope of review in habeas actions when a claim, such as the one presented here, is advanced:

"The general rule is that the sufficiency of evidence to sustain a conviction in a state court prosecution is not reviewable in a Federal habeas corpus proceedings. However, a conviction which is totally devoid of evidentiary support as to a crucial element of the offense is unconstitutional under the Due Process Clause of the Fourteenth Amendment. Such a claim is reviewable in a federal habeas corpus proceeding.

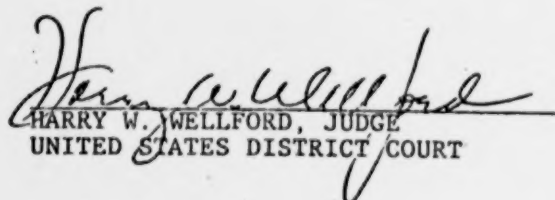
"The question before this Court is limited to whether the record contains any relevant evidence whatsoever to support the jury's finding,...." [citations omitted].

Brooks v. Rose, 520 F.2d 775, 777 (6th Cir. 1975).

A review of the more than four hundred pages of trial testimony in this case indicates that there is evidence to support the jury's finding. The state's evidence, although of a circumstantial nature, places the respondent in the household of the victim on the day of the killing. A knife, identified as belonging to petitioner's girlfriend, and which petitioner admits taking from her house, was found in the alley behind the victim's house. The knife had traces of blood of the same type as the victim's. A pathologist testified that the knife was consistent with the wounds inflicted on the victim. The state's evidence also showed that petitioner was seen after the murder was said to have occurred with cuts on his leg and face, and witnesses testified that he had blood stains on his leg. All the evidence contained in the record considered, it does not appear that the conviction was devoid of evidentiary support so that it constitutes a violation of petitioner's Fourteenth Amendment due process rights.

Petitioner's application for the writ of habeas corpus will be denied at this time unless within the thirty (30) day time period specified his counsel can persuade the Court that there was no relevant evidence whatever to support the jury's finding of guilt.

This 22 day of May, 1978.


HARRY W. WELLFORD, JUDGE
UNITED STATES DISTRICT COURT

FILED

FEB 9 1979

NO. 78-1391
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN P. HEHMAN, Clerk

+ 90 = May 10, 1979
(Thurs.)

JOHNNY L. BLAKE

Petitioner-Appellant

v.

O R D E R

VINSON THOMPSON, Warden

Respondent-Appellee

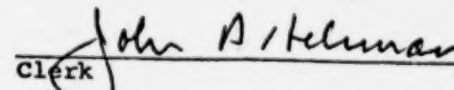
BEFORE: LIVELY, KEITH and MERRITT, Circuit Judges.

This appeal from dismissal of a petition for habeas corpus has been submitted to the court on the briefs of counsel, oral argument having been waived.

Upon examination of the record on appeal, including the proceedings in a state court in which the petitioner was convicted of first degree murder, the court concludes that petitioner's conviction was not "totally devoid of evidentiary support as to a crucial element of the offense" and is therefore not reviewable in a federal habeas corpus proceeding. Brooks v. Rose, 520 F.2d 775, 777 (6th Cir. 1975).

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT


Clerk